



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/170678

PRELIMINARY RECITALS

Pursuant to a petition filed December 08, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Rock County Department of Social Services in regard to Medical Assistance, a telephone hearing was held on March 10, 2016.

The issue for determination is whether the county agency correctly seeks to end the petitioner's MA-Waiver eligibility because he no longer meets the nursing home level of care.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

I

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Rock County Department of Social Services
1900 Center Avenue
PO Box 1649
Janesville, WI 53546

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Rock County.
2. The petitioner had been receiving MA Waiver services, and underwent an annual re-screen on November 17, 2015.

3. The county agency seeks to end the petitioner's Waiver benefits because the Long-Term Care Functional Screen indicates that he no longer meets the nursing home level of care.
4. Petitioner suffers from chronic lower back pain and chronic right shoulder pain, and has been diagnosed with lumbrosacral degenerative disc disease. The petitioner's pain medication prescriptions were terminated in October, 2015.
5. The petitioner needs assistance with moving up and down stairs (only home bathroom is on the second floor), assistance with dressing and bathing on bad days (he estimates 2-3 bad days per week) and he uses a cane, lift chair, and a hospital bed.

DISCUSSION

The county agency seeks to end the petitioner's eligibility for MA-Waiver benefits because he no longer requires the level of care needed to remain in the program. See Medicaid Eligibility Handbook, Chapter 28, generally, or information on the various MA-Waiver programs. Eligibility depends upon a person's ability to function independently falling below a certain level. This is referred to as the person's functional capacity level. Depending upon the program, persons can be eligible at either the nursing home or non-nursing home level of care. Wis. Admin. Code, § DHS 10.33(2); Wis. Stat. § 46.286.(1)(a). The petitioner must meet the nursing home level of care to remain eligible for the benefits he has been receiving.

The nursing home level of care is described as follows at Wis. Admin. Code, § DHS 10.33(2)(c):

A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has a cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment.
6. The person has a complicating condition that limits the person's ability to independently meet his or her needs as evidenced by meeting both of the following conditions:
 - a. The person requires frequent medical or social intervention to safely maintain an acceptable health or developmental status; or requires frequent changes in service due to intermittent or unpredictable changes in his or her condition; or requires a range of medical or social interventions due to a multiplicity of conditions.

b. The person has a developmental disability that requires specialized services; or has impaired cognition exhibited by memory deficits or disorientation to person, place or time; or has impaired decision making ability exhibited by wandering, physical abuse of self or others, self neglect or resistance to needed care.

Wis. Admin. Code, § DHS 10.33(2)(c).

A developmental disability is defined in Wis. Admin. Code, § 10.13(16), as follows:

Developmental disability" means a disability attributable to brain injury, cerebral palsy, epilepsy, autism, Prader-Willi syndrome, mental retardation, or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mental retardation, that has continued or can be expected to continue indefinitely and constitutes a substantial handicap to the afflicted individual. "Developmental disability" does not include senility that is primarily caused by the process of aging or the infirmities of aging.

Cognitive pertains to "conscious intellectual activity" such as "thinking, reasoning, remembering, imagining, or learning words." Definition found online at <http://www.merriam-webster.com/medical/cognitive>.

Activities of daily living, or ADLs, refer to "bathing, dressing, eating, mobility, transferring from one surface to another such as bed to chair and using the toilet." Wis. Admin. Code, § DHS 10.13(1m). Instrumental activities of daily living, or IADLs, refers to "management of medications and treatments, meal preparation and nutrition, money management, using the telephone, arranging and using transportation and the ability to function at a job site." Wis. Admin. Code, § 10.13(32)

Agencies must determine eligibility using a uniform functional screening tool prescribed by the Department. Wis. Admin. Code, § DHS 10.33(2)(a). The problem with this requirement is that the Department has changed the screening tool to better comply with the federal government's long-term waiver provisions, but it has not changed the administrative code to reflect these changes. See DHA Decision No. FCP-44/115906. Because the administrative code has the force of law, I must follow it rather than the screening tool.

The agency seeks to end the petitioner's Waiver benefits because the screening tool indicated that he no longer meets the nursing home level of care. The petitioner has been receiving these benefits for 13 years. The respondent contends that the petitioner's functional capacity⁷ has increased, while the petitioner contends that it has worsened over time. The petitioner also testified at hearing that he does not recall speaking with the screener at the time of the November, 2015, LTCFS; he stated that he was on a lot of morphine and oxycodone when questioned. I note that the LTCFS references that an initial attempt to complete the rescreen was abandoned when the respondent's screener concluded that petitioner was "completely out of it." Petitioner's testimony is further called into question since it is not corroborated by the handwritten request for hearing, wherein petitioner wrote:

... I was confused with the questions and unsure of how to answer them, and I gave the wrong answers, plus I was asked in a very hard time of me not having any pain meds and I've been going through a very rough time and my head hasn't been in the right place...

Exhibit 1.

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. [REDACTED]*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). The court in [REDACTED] stated that the policy behind this principle is to assign the burden to the party seeking to change

a present state of affairs. The Department acknowledged the principle laid down in [REDACTED] in Final Decision ATI-40/87198 where [REDACTED] ruled on August 17, 1995, that in any fair hearing concerning the propriety of an agency action, the county or state agency has the burden of proof to establish that the action it took was proper given the facts of the case. At the very least, the agency must present a prima facie case to go forward. After the agency presents a prima facie case must the petitioner submit enough evidence to rebut that case.

By seeking to discontinue the petitioner's benefits, the agency seeks to change the present state of affairs, making it the moving party. I presented a prima facie case that it correctly determined petitioner's level of care. Petitioner attempted to rebut the case arguing that the screen was completed while he was under the influence of medications, and that his condition has actually deteriorated over the last few years. However, I found his testimony to be uncorroborated and not entirely credible. As such he has failed to successfully rebut the respondent's determination.

CONCLUSIONS OF LAW

The respondent correctly seeks to end the petitioner's MA-Waiver eligibility because he no longer meets the nursing home level of care.

THEREFORE, it is

ORDERED

That petitioner's appeal is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

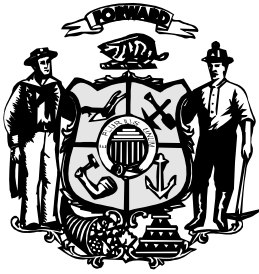
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 22nd day of April, 2016

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 22, 2016.

Rock County Department of Social Services
Bureau of Long-Term Support